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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AARON KAUFMAN, Plaintiff, Cross-defendant and Appellant, v. CALIFORNIA PHYSICIANS' SERVICE, Defendant, Cross-complainant and Appellant.	B282581 (Los Angeles County Super. Ct. No. BC577827)

APPEALS from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed in part, reversed in part.

Cwiklo Law Firm and David Peter Cwiklo for Plaintiff, Cross-defendant and Appellant.

Manatt, Phelps & Phillips, LLP, Barry W. Lee, Sharon B. Bauman, and Kevin P. Dwight for Defendant, Cross-complainant and Appellant.

Plaintiff Aaron Kaufman filed this action against defendant California Physicians' Service, doing business as Blue Shield of California (Blue Shield). He alleged causes of action for (1) wrongful termination in violation of public policy and the whistleblower protection statutes (Lab. Code, § 1102.5 et seq.); (2) failure to pay earned executive incentive compensation in violation of public policy and Labor Code sections 200-204; (3) conversion and theft of labor (Civ. Code, § 3336); and (4) breach of contract.

Blue Shield filed a cross-complaint alleging causes of action for (1) fraud by intentional misrepresentation; (2) fraud by concealment; (3) negligent misrepresentation; (4) breach of fiduciary duty; and (5) breach of the duty of loyalty.

Trial was by jury. Following presentation of Kaufman's case in chief, the trial court granted a nonsuit as to his causes of action for wrongful termination, conversion, and breach of contract. The jury found in favor of Blue Shield on Kaufman's remaining cause of action for failure to pay earned executive incentive compensation. On Blue Shield's cross-complaint, the jury found Kaufman committed fraud by intentional misrepresentation and breach of fiduciary duty but found Blue Shield was not harmed by Kaufman's actions and awarded Blue Shield no damages. The trial court entered judgment in favor of Blue Shield on the complaint and in favor of Kaufman on the cross-complaint.

On appeal, Kaufman asserts the trial court erred in granting the nonsuit, requiring reversal of the judgment as to all of his causes of action. He also claims evidentiary error. Blue Shield contends a new trial is required based on inconsistent jury verdicts and the insufficiency of the evidence to support those

verdicts. We affirm the judgment as to Kaufman's complaint. We reverse the judgment as to Blue Shield's causes of action for fraud by intentional misrepresentation and breach of fiduciary duty in the cross-complaint.

FACTUAL BACKGROUND

I. Blue Shield's Case: Kaufman's Termination for Violations of Company Policies

A. *Kaufman's Employment with Blue Shield*

In March 2013, Blue Shield hired Kaufman as its Chief Technology Officer and Vice President of Health Information Technology, working out of Blue Shield's San Francisco office. As part of his compensation, Kaufman was eligible, under specified circumstances, to earn an executive bonus. The executive bonus policy in effect during March 2015, when Kaufman was terminated, stated that (1) to earn a bonus, executives must have been employed on the date bonuses are paid; and (2) employees who were terminated for cause would not be eligible for a bonus.

Blue Shield maintained a Code of Conduct that set forth behavior and ethical standards for employees. It applied to all employees, including Kaufman. The Code of Conduct provided that "managers have heightened obligations as senior custodians of our Company values and culture." The Code of Conduct included a reporting website as well as a toll-free compliance hotline. The Code of Conduct also provided: "Blue Shield takes all reports seriously, and welcomes the opportunity to resolve problems that may arise and take steps to prevent them from recurring. If Corporate Compliance undertakes an investigation, . . . we are all expected to fully cooperate and assist

in the process. To safeguard the integrity of the investigation process, it is important that you maintain the confidentiality of investigation-related information, as instructed. [¶] . . . If an allegation is made against you, you must fully cooperate with the investigation and refrain from interfering with the investigation or otherwise acting improperly. . . ."

Blue Shield also maintained a Business Travel & Expense Reimbursement Policy (Travel & Expense Policy). Kaufman received a copy of this policy and understood that he was subject to its provisions. The Travel & Expense Policy contained standards and practices for business-related expenses that employees, including Kaufman, incurred during business travel. Kaufman understood that failure to comply with the Travel & Expense Policy "may result in disciplinary action, up to and including termination," and "[f]alsification of expense reports will result in termination."

In particular, Blue Shield required that all travel and business expenses be paid using a Blue Shield corporate credit card. It required employees who incurred more than $500 in business expenses per year to apply for a corporate credit card, use of which was governed by the Travel & Expense Policy. The Travel & Expense Policy was clear as to a cardholder's responsibilities: "[s]pend [Blue Shield's] funds prudently," "[s]ubmit expense reports once per month," and provide receipts "for all expenses $25.00 or higher." The policy explicitly provided that employees were not to charge personal transactions to the corporate card. If an employee incurred incidental personal charges while using the card for business, the employee was expected to reimburse Blue Shield directly. The employee was not to use the corporate credit card for purely personal charges.

Kaufman applied for and received a Blue Shield corporate credit card to pay for his business expenses. Kaufman understood and acknowledged in writing that the corporate credit card was " 'company property and not for personal use,' " and that the card was "NOT to be used for personal transactions." Kaufman also understood that failure to adhere to the procedures required for use of the card would constitute misuse of company property, which could result in revocation of the card and other disciplinary measures, including termination.

B. *Kaufman's Position and Duties Within Blue Shield*

Kaufman's immediate supervisor was Blue Shield's Senior Vice President and Chief Information Officer, Michael Mathias. Mathias, in turn, reported to Blue Shield's Chief Executive Officer, Paul Markovich. Kaufman's subordinates included Senior Director Michael Thomas and Finance Manager Saisha Masand, who were part of Kaufman's Health Information Technology "HIT" Team.

One of Kaufman's responsibilities was Blue Shield's participation in a statewide program called Cal INDEX, an integrated data exchange for healthcare providers across California. A subset of this program was the Veritas Data Technology Project (Veritas Project), Blue Shield's initiative to aggregate the company's internal customer and provider data into a unified database, so that it could be available for and utilized by Cal INDEX. Kaufman's actions with respect to one of the vendors hired in connection with the Veritas Project form the basis of his wrongful termination action.

C. *Kaufman Is Warned About Expense Violations*

In March 2014, after learning that Kaufman was one of the company's top spenders, Blue Shield's Chief Financial Officer, Michael Murray, asked the Internal Audit group to review Kaufman's expenses from April to December 2013. The review indicated that Kaufman was charging expenses for which he had no approval, he failed to identify a business purpose for 78 percent of the expenses that he incurred, and he did not provide the requisite substantiating receipts for all expenses.

Murray reported these findings to Mathias and Mary O'Hara, Blue Shield's Chief Human Resources Officer and Senior Vice President of Internal Communications. He told them he believed Kaufman should be fired. Mathias disagreed, and he and Murray agreed to give Kaufman a written warning that future violation of the Travel & Expense Policy would result in disciplinary action, possibly termination.

Mathias gave Kaufman verbal and written warnings regarding his use of his corporate credit card. Mathias advised Kaufman that if he continued to violate the Travel & Expense Policy, he could be terminated. Kaufman acknowledged that Mathias spoke to him about his expenses around late March 2014. According to Mathias, Kaufman "assured me it would never happen again," and Mathias never wrote Kaufman up again. Mathias saw "no evidence that anything was really wrong. There was no need to." Specifically, Mathias saw no evidence "[t]hat anything was out of line or out of sorts, just that he was getting a little behind in some of his expense reports. We had a conversation about that. He told me he would take care of it. I didn't see any reason to take any further action. I trusted [Kaufman] to get it done." Mathias added that "[t]here was a

follow-up email a few months later about he's behind. If you don't take care of it or—it will be out of my hands. It will have to go to corporate compliance."

Mathias sent a follow-up email in October 2014 stating that they needed "another talk about expenses." In his response, Kaufman suggested that his assistant, Tina Coleman, was responsible for not submitting his expense reports in a timely manner.

In January 2015, Mathias sent Kaufman another email, notifying him that he had a "seriously overdue personal expense issue that need[s] to be cleaned up this week. If not done so by 1/30/15 the matter goes to Corporate Compliance and out of my hands. Suggest you get it done."

D. *Kaufman Becomes the Subject of Negative Publicity On Social Media, and an Investigation into His Conduct Is Launched*

On January 6, 2015, Kaufman organized an after-hours Blue Shield "team-building" event at Lucky Strike, a bowling alley in San Francisco. Kaufman's then-girlfriend, actress Tara Reid, accompanied him. At some point during the evening, Reid removed her shirt and proceeded to pose suggestively for photos, shirtless, wearing only her bra, while straddling bowling balls. Reid then posted these photos to her public social media accounts.

News of Reid's behavior was picked up by numerous media outlets the following day. Kaufman was embarrassed by Reid's conduct and admitted that the photos did not reflect well on him or Blue Shield.

Kaufman's relationship with Reid, and her shirtless photos, became the subject of workplace gossip. On February 12, 2015, an employee emailed O'Hara and Mathias, bringing the matter to their attention. In response, O'Hara and her Human Resources (HR) team began an investigation into Kaufman's conduct. Mathias, Thomas, and Masand were interviewed as part of the investigation.

After he learned that HR was investigating his corporate credit card expenses, Kaufman withdrew the expense report he had previously submitted for the bowling event. On February 27, 2015, Kaufman also reversed another personal expense he had previously charged on his corporate credit card while the investigation was pending.

E. *Blue Shield Cancels Kaufman's Corporate Credit Card, and He Admits Misusing the Card*

On March 2, 2015, Blue Shield cancelled Kaufman's corporate credit card for delinquency in submitting expense reports, his violations of the Travel & Expense Policy, and failing to reimburse Blue Shield for personal expenses.

On March 4, 2015, Kaufman sent O'Hara an email in which he admitted charging personal expenses on his corporate credit card. He blamed his wife, who had filed for divorce, for his need to put personal expenses on his corporate credit card. He acknowledged that "all throughout last year, I think the total is around $9k that I owed the company."

At trial, Kaufman testified that he intended to repay Blue Shield for all of the personal items he charged. He acknowledged that he still owed Blue Shield between $7,000 and $12,000.

F. *The Results of the Investigation*

On March 5, 2015, the Internal Audit group sent a memorandum to Murray documenting the results of its review of Kaufman's travel and expense charges from September 1, 2014 through March 1, 2015. As of March 2, 2015, Kaufman had $76,634 in expenses that were submitted but not approved, $48,052 in expenses that were not submitted and not approved, and $21,943 in expenses for which there were no receipts.

The confidential internal investigation report was sent to O'Hara on March 6, 2015. In the report, the Internal Audit group documented each allegation against Kaufman, as well as the evidence supporting those allegations.[1] In addition to allegations regarding Reid's inappropriate conduct at the bowling event and Kaufman's lack of candor when questioned about the matter, it was alleged that Kaufman had created "a false and misleading record by reporting personal expenses as business expenses, and using a corporate credit card for personal use." After HR reviewed the expense reports related to the bowling event, HR "determined that an audit was required to ascertain if [Kaufman] violated Blue Shield's Corporate Credit Card Policy . . . , and whether or not he was using the corporate credit card for personal use." After the audit, Blue Shield concluded that the allegations were substantiated.

Another substantiated allegation from the investigation was that after learning that HR was investigating the bowling alley event, Kaufman spoke to other employees about the

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[1] This was the same day Kaufman scheduled a meeting with Markovich. He asserts that the purpose of the meeting was to report the complaints on which he based his wrongful termination claims. That meeting was rescheduled.

investigation. Blue Shield contended this was a violation of the Code of Conduct.

G. *Kaufman's Termination*

On March 9, 2015, O'Hara and Murray interviewed Kaufman about his misuse of the corporate credit card. Mathias was present as a silent observer because he was Kaufman's supervisor. According to both O'Hara and Kaufman, Mathias did not question Kaufman. After the interview, O'Hara placed Kaufman on administrative leave pending the investigation's conclusion.

After O'Hara placed Kaufman on administrative leave, she discussed the investigation and the interview with Murray and Mathias. She recommended termination based on Kaufman's knowing violation of the Travel & Expense Policy, his lack of candor about the bowling alley incident, and his interference with the investigation. Murray and Mathias agreed.

The following day, March 10, 2015, O'Hara sent Kaufman a letter terminating his employment with Blue Shield for violating the Code of Conduct and the Travel & Expense Policy, interfering with the HR investigation, and causing reputational damage associated with the inappropriate pictures taken the night of Kaufman's bowling alley event.

H. *Expert Testimony Regarding Blue Shield's Losses*

Blue Shield's damages expert, Jeffrey Kinrich, reviewed, among other things, the expense reports that Kaufman submitted between April 2014 and March 2015. He concluded that Blue Shield spent at least $86,878 paying Kaufman's personal

expenses incurred from April 2014 to March 2015, after Kaufman was put on notice about his 2013 expense violations.

II. Kaufman's Case: His Termination in Retaliation for Blowing the Whistle on Mathias's Relationship with a Veritas Project Vendor

A. *Blue Shield's Vendor Selection Practices*

When Kaufman came to work at Blue Shield, his main focus was to get Blue Shield ready for Cal INDEX. Thomas was responsible for oversight of Cal INDEX.

Thomas identified Blue Shield's standard vendor selection policy and practices. Blue Shield's policy required competitive bidding for any contract in excess of $100,000. Blue Shield would select the most capable, lowest cost vendor for the work. Thomas had never known of a vendor awarded a contract in excess of $100,000 without participation in the competitive bidding process.

Additionally, it was generally Blue Shield's policy and practice to secure a "fixed-fee" contract from a vendor, not a "time-and-materials" contract. A fixed-fee contract would guarantee Blue Shield a set fee for a vendor's services, as opposed to a time-and-materials contract, which would fluctuate with the time and materials supplied by the vendor.

It was also Blue Shield's policy and practice to release and replace vendors who failed to perform.

B. *Mathias Selects MBI as a Vendor for the Veritas Project, and Thomas Raises Concerns Regarding MBI's Performance*

One of the primary vendors contracted to work on the Veritas Project was MBI Solutions LLC (MBI). Mathias awarded a Veritas Project contract to MBI without requiring MBI to participate in a competitive bidding process despite Blue Shield's policy requiring such a process. Additionally, the contract was for time and materials, rather than a fixed fee. Thomas had never worked with MBI before and had no input into its selection as a vendor.

Thomas oversaw MBI's work on the Veritas Project. MBI went over its allotted budget and asked for more money at least three times. After MBI requested and received over $1 million in additional funds in the second quarter of 2014, Thomas raised the issue with Mathias, and they started having monthly meetings regarding "MBI's ability to deliver on time, on budget."

In addition to the cost, there were quality issues with MBI's work. Thomas spoke with another vendor involved with the Veritas Project, Cognizant, about the quality issues. Cognizant indicated that they could do a better job on in the project than MBI was doing.

Thomas began discussing the issue of MBI's performance with Mathias about mid-2014. About October 2014, Thomas and Kaufman met with Mathias and again raised the issue. Mathias got angry and asked them "not to talk about letting MBI go. That was his decision. This was his project." Thomas was confused as to why Mathias would refuse to remove a vendor who was "spending that much money" and not "delivering the quality."

Thomas discussed the way in which MBI was awarded a contract outside Blue Shield's competitive bidding process with the procurement senior manager, someone named Brian. Brian "found it fishy as well," but he refused to do anything because technology sourcing was up to the vice president in charge of overseeing contracts. Thomas also discussed the matter with Kaufman. At first, Kaufman was willing to let the matter go. But by the second time MBI asked for more money, Kaufman began to raise the issue.

At that point, Thomas, Kaufman, Masand,[2] and other members of their team began looking for other vendors. They eventually focused on Cognizant, who was familiar with the project, would take less time to get the work done, and "had the most attractive offer."

Thomas also discussed MBI's cost and performance problems with other Blue Shield personnel, including Simon Jones, Vice President of HIT Product Strategy, Devon Valencia, Vice President of IT Program Delivery, and Director Angela McArthur. When Thomas mentioned replacing MBI to Valencia, she told Thomas, "Mathias would probably not take kindly to

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[2] According to Masand, she questioned why Blue Shield was using MBI when it had cheaper vendors it could have used. In October 2014, Masand recommended to Thomas that MBI be replaced by Cognizant. A couple of times, Masand discussed with Thomas the possibility Mathias was receiving kickbacks from MBI. She could not understand why they were continuing to use MBI as a vendor when it was constantly over budget. She did not know if Mathias was taking bribes, but she "thought there might be something with MBI specifically. However, Kaufman never told her that he thought Mathias was taking bribes or kickbacks from MBI.

such a suggestion." She said that MBI was " '[his] vendor' " and that removing MBI was " 'off limits.' "

About this time, Thomas and Kaufman began discussing the possibility Mathias was "on the take" and receiving some form of kickbacks from MBI, based on Mathias's violation of Blue Shield's required competitive bidding procedures and vendor retention policy, and his award of a time-and-materials contract instead of a fixed-fee contract to MBI. They thought "there was some reason to keep [MBI] in place that a logical mind couldn't explain."

About November or December of 2014, Thomas and Kaufman decided to press Mathias about changing vendors. If he refused, they intended to bring the matter to Markovich's attention.

C. *Kaufman also Expresses Concerns About MBI's Performance*

Kaufman began having suspicions about Mathias's relationship with MBI about the middle of 2014, when he "saw the constant missing of dates and bad deliverables." He told Mathias they were overpaying for something they were not getting. Kaufman was "trying to see if there was something else going on that he was wanting to tell me about." Mathias's response was to tell Kaufman to be quiet about it, it was Mathias's problem, not Kaufman's.

At some point, Kaufman brought in a new project manager, Jon Barcellona, to get the Veritas Project back on track. At the end of August 2014, Barcellona sent his findings to Kaufman, who forwarded them to Mathias and Valencia. Barcellona noted MBI's "significant non-performance" but advised that "[d]ue to

the short time window and the general technical competence of the team members, change in vendor should not be executed," although greater supervision of MBI's work might be necessary.

By October 2014, MBI had not met any of its deadlines, and MBI's product had serious defects. Kaufman continued to question Mathias about his selection of MBI for the Veritas Project. Mathias told him to shut up and leave the matter alone.

About this time, Mathias invited Kaufman to play golf with him and MBI Chief Financial Officer Derek Nash at an Oakland golf course chosen by Mathias. Mathias told Kaufman the purpose of this golf outing was to "improve our relationship" with MBI. During the outing, Kaufman brought up the problems he was having with MBI and asked if there was any way he could get a fixed price. He "never really got a direct answer to any of [his] questions." Mathias and Nash said they were there to have fun and would talk business later. While golfing, Kaufman saw things that seemed "really shady" to him. Both Mathias and Nash had the same golf clubs, the same GPS golf ball tracking device, and the same golf equipment, although Mathias was living in California and Nash in New Jersey.

Also in October 2014, the cost overruns and delays had become an urgent problem. Mathias stepped up his project meetings from monthly to weekly. Kaufman asked Mathias what else was going on, and whether there was "something funny I should know about?" Kaufman wanted to know "why do we keep picking this vendor," because Kaufman could not see the reason. Mathias told Kaufman: "[Y]ou're done with this. Don't talk about it anymore. I'm taking over." Mathias removed Kaufman from the Veritas Project and took over control of the project.

In December 2014, Kaufman made the decision to go over Mathias's head and secure a fixed-fee bid on the project. He went through the process of getting requests for prices (RFPs) from other vendors. When Mathias learned about it, he told Kaufman to stop it. Kaufman did not stop. He received RFPs that would result in significant savings for Blue Shield.

D. *Kaufman Reports His Concerns to Other Senior Vice Presidents and Schedules a Meeting with Markovich*

In January 2015, Kaufman "report[ed] up" to Senior Vice President and Chief Medical Officer Marcus Thygeson and to Senior Vice President of Health Care Quality Juan Davila that he "had RFPs that were substantially lower than what MBI was charging." Both Thygeson and Davila indicated they were in favor of saving money, but they did not ask any further questions regarding the matter. Kaufman also told Mathias about the RFPs, but Mathias told Kaufman "not to worry about it, that he had it all under control."

Kaufman then decided to report the matter to Markovich. He scheduled a meeting with Markovich for Friday, March 6, 2015. Kaufman hoped to gain approval to move forward with another vendor.[3] In anticipation of the March 6, 2015 meeting with Markovich, Kaufman, Thomas, and Masand got together several times in February and early March 2015. Masand, with

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[3] According to Thomas, the goals of this meeting were to get the Veritas Project completed for the lowest cost and "to have Mr. Markovich start to look into why MBI . . . all of a sudden went from zero dollars to I don't know how many millions of dollars they were taking from Blue Shield. So look into making sure there wasn't any improprieties going on."

input from Thomas and Kaufman, put together a PowerPoint presentation regarding MBI's failures that they intended to present to Markovich.

E. *Kaufman's Meeting with Markovich Is Postponed and Kaufman Is Terminated*

On Friday, February 27, 2015, Kaufman and Blue Shield's Director of Finance exchanged emails regarding submission of Kaufman's outstanding corporate credit card expenses by March 2, 2015, or risking having his credit card canceled. Kaufman said that he had "the majority of these expenses ready to go, but [Mathias] may need some time to go through them."

On March 3, 2015, Kaufman emailed Mathias: "I know you are on vacation. I urgently need to speak with you. I understand how frustrating this is for you but really need to talk." According to Kaufman, they needed to talk about the credit card cancellation and "[r]emoving the cancer from the organization, which was MBI. And [Kaufman] was going to start to show [Mathias] how much the RFPs were coming in at and how much [they] could save." Mathias did not get back to Kaufman.

The March 6, 2015 meeting with Markovich was cancelled, without explanation. It was rescheduled to the following Thursday, March 12, 2015.

On Monday, March 9, 2015, Kaufman was called into a meeting with O'Hara, Murray, and Mathias. He was told to bring his Blue Shield laptop. O'Hara and Murray questioned Kaufman about his expenses. At the end of the meeting, Kaufman was suspended, had to turn his laptop over to O'Hara, and was asked to leave the premises.

The next day, Tuesday, March 10, 2015, O'Hara called Kaufman and told him he was terminated. Kaufman received a written termination letter from O'Hara.

PROCEDURAL BACKGROUND

Kaufman filed this action against Blue Shield on April 6, 2015. Thomas and Masand filed a separate action against Blue Shield on April 24, 2015. Thomas and Masand alleged causes of action for wrongful termination in violation of public policy and the whistleblower protection statutes, failure to pay earned executive incentive compensation, conversion and theft of labor, and breach of contract.

Blue Shield filed its cross-complaint against Kaufman. Thereafter, the trial court granted Kaufman's motion to consolidate Thomas and Masand's actions with his own. On the date set for trial, Blue Shield filed notice that it had settled with Thomas and Masand.

Following Kaufman's presentation of his case in chief, Blue Shield filed a motion for nonsuit. It argued that there was no evidence that Kaufman reported illegal activity or was terminated for doing so. Blue Shield also argued there was no evidence to support Kaufman's other causes of action. The trial court granted the motion as to Kaufman's causes of action for wrongful termination, conversion, and breach of contract. Trial continued on Kaufman's remaining cause of action, failure to pay earned executive incentive compensation, and Blue Shield's causes of action for fraud, negligent misrepresentation, breach of fiduciary duty, and breach of the duty of loyalty.

At the conclusion of the trial, the jury returned its special verdict form. On April 5, 2017, the trial court entered judgment in favor of Blue Shield on Kaufman's complaint and in favor of Kaufman on Blue Shield's cross-complaint.

Kaufman filed his notice of appeal on May 15, 2017. Blue Shield filed its notice of appeal on June 2, 2017.

DISCUSSION

I. On Appeal

A. *Nonsuit*

1. *Standard of Review*

On appeal from a judgment of nonsuit, the question is whether plaintiff presented any substantial evidence which would support a judgment in his favor. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291; accord, *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125.) Stated otherwise, we must determine whether the plaintiff "introduce[d] evidence sufficient to establish a prima facie case." (*Orange County Water Dist. v. MAG Aerospace Industries, Inc.* (2017) 12 Cal.App.5th 229, 239; accord, *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436.)

" 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded.' [Citation.] The plaintiff's evidence, however, must have substance upon which reasonable minds can differ; evidence that raises mere conjecture or speculation is insufficient.

[Citation.]" (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 650; see also *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580-1581.) In order to reverse a nonsuit, we must find substantial evidence which would support a judgment in plaintiff's favor under a tenable theory of liability. (*Wolf v. Walt Disney Pictures & Television*, *supra*, 162 Cal.App.4th at p. 1125; *Kidron*, *supra*, at p. 1580.)

2. *Wrongful Termination in Violation of Public Policy*

a. *Elements of a Cause of Action for Wrongful Termination in Violation of Public Policy*

Even an at-will employee may not be discharged for reasons that violate fundamental public policy. ~[Deletion]~[4] (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 887.) The elements of the cause of action are (1) employment by the defendant, (2) termination, (3) the claimed violation of public policy "was a motivating reason" for the termination, and (4) harm. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 641.)

There is no dispute that the first two elements of the cause of action were met here: Kaufman was employed by Blue Shield, and he was terminated. We thus turn to the third element—whether the claimed violations of public policy were a motivating reason for Kaufman's termination. We first examine the claimed violations of public policy to determine whether they are of the type that would support a claim for wrongful termination.

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[4] Kaufman acknowledged that he was an at-will employee.

b. *What Constitutes a Public Policy for Purposes of a Cause of Action for Wrongful Termination in Violation of Public Policy*

Kaufman identifies four public policies that he sought to vindicate. Specifically, he asserts that he "presented substantial evidence he responsibly reported what he reasonably and in good faith believed was Mathias'[s] actual and/or perceived unlawful vendor financial misconduct, including Mathias'[s] vendor fraud, embezzlement, bribery and kickbacks that pilfered millions from [Blue Shield] . . . ."

"To support a common law wrongful discharge claim, the public policy 'must be: (1) delineated in either constitutional or statutory provisions; (2) "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual; (3) well established at the time of the discharge; and (4) substantial and fundamental.' " (*Haney v. Aramark Uniform Services, Inc.*, *supra*, 121 Cal.App.4th at p. 642, quoting *Stevenson v. Superior Court*, *supra*, 16 Cal.4th at p. 894.) Penal Code provisions generally reflect a substantial and fundamental public policy. (See *Haney*, *supra*, at pp. 642-643.) Where an employer terminates an employee who seeks to further such public policy "by responsibly reporting suspicions of illegal conduct to the employer," a cause of action for wrongful termination in violation of public policy is supported. (*Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1127; accord, *Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1345; cf. *McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 463-464 [California False Claims Act protects whistleblowers who report possible false claims based on reasonable suspicions].)

Kaufman claims the alleged crimes of embezzlement (Pen. Code, § 504), bribery (*id.*, § 641.3) and kickbacks (*ibid.*) reflect a substantial and fundamental public policy for purposes of his wrongful termination cause of action. We agree. (*Haney v. Aramark Uniform Services, Inc.*, *supra*, 121 Cal.App.4th at pp. 642-643; *Collier v. Superior Court*, *supra*, 228 Cal.App.3d at p. 1127.)

We therefore turn to the question whether the claimed violation of public policy "was a motivating reason" for the termination. (*Haney v. Aramark Uniform Services, Inc.*, *supra*, 121 Cal.App.4th at p. 641.) We must determine whether Kaufman "introduce[d] evidence sufficient to establish a prima facie case" (*Orange County Water Dist. v. MAG Aerospace Industries, Inc.*, *supra*, 12 Cal.App.5th at p. 239) that he was terminated for reporting Mathias's fraud, embezzlement, bribery, and kickbacks.

c. *The Employee Must Report Suspicions of Public Policy Violations to the Employer*

In order to show that he was terminated in retaliation for reporting illegal conduct or a public policy violation, the employee must present evidence that his employer was aware that he complained of illegal conduct or a violation of fundamental public policy. (See *Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 758 [no prima facie case of retaliatory discharge where no evidence employee communicated to his employer his objection to union contract on ground of illegality]; see also *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1046.) The employee's complaints must inform the employer that the employee is basing them on a reasonable belief that the employer is engaged in

illegal conduct or conduct that violates public policy. (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046; accord, *Yanowitz*, *supra*, at p. 1046.) The "employee 'must convey the information in a form which would reasonably alert his or her employer of the nature of the problem.' " (*Ferrick v. Santa Clara University*, *supra*, 231 Cal.App.4th at pp. 1350-1351.)

Critically, in order to establish a prima facie case of retaliation, more is required than the " 'employee's unarticulated belief' " that the employer's conduct is illegal or in violation of public policy. (*Castro-Ramirez v. Dependable Highway Express, Inc.*, *supra*, 2 Cal.App.5th at p. 1046; accord, *Yanowitz v. L'Oreal USA, Inc.*, *supra*, 36 Cal.4th at p. 1046; see also *Jaburek v. Foxx* (7th Cir. 2016) 813 F.3d 626, 633 [employee claiming retaliation under Title VII "must produce evidence that she gave 'a cognizable expression of opposition' to discriminatory practices"]; *Reid v. Concentra Health Services, Inc.* (E.D. Cal. 2015) 2015 WL 1729873 *12 ["employee's unarticulated belief [that employer violated laws regarding compensation] does not establish protected conduct for the purposes of establishing a prima facie case of retaliation"]; *Luchetti v. Hershey Co.* (N.D. Cal. 2009) 2009 WL 2912524 *5 [no evidence employee engaged in protected activity where "the actual communications before the [c]ourt" "did not amount to opposing an unlawful . . . condition"].)

The employee "need not explicitly and directly" state that he or she believes the employer's conduct is illegal or in violation of public policy. (*Castro-Ramirez v. Dependable Highway Express, Inc.*, *supra*, 2 Cal.App.5th at p. 1046.) The " ' "employee is not required to use legal terms or buzzwords" ' " when complaining about such conduct. (*Ibid.*; accord, *Yanowitz*, *supra*,

36 Cal.4th at p. 1047.) What is required is that " ' "the employee's comments, when read in their totality," ' . . . ' "sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful . . . manner," ' " or in a manner that violates public policy. (*Castro-Ramirez*, *supra*, at pp. 1046-1047; accord, *Yanowitz*, *supra*, at p. 1047.) An employee's " '[c]omplaints about personal grievances or vague or conclusory remarks' " are insufficient to establish that the employee engaged in protected conduct. (*Castro-Ramirez*, *supra*, at p. 1046; accord, *Yanowitz*, *supra*, at p. 1047.)

d. *Kaufman's Evidence Regarding His Complaints about Mathias and MBI*

Kaufman contends that he "presented substantial evidence he responsibly reported what he reasonably and in good faith believed was Mathias'[s] actual and/or perceived unlawful vendor financial misconduct, including Mathias'[s] vendor fraud, embezzlement, bribery and kickbacks." The record does not support Kaufman's contention. Rather, it shows that while Kaufman had suspicions that Mathias might have engaged in fraud, embezzlement, bribery, and kickbacks, he never reported these suspicions to Mathias or any of Mathias's superiors.

Noticeably absent from Kaufman's discussion of his contention that he complained of Mathias's suspected illegal conduct are citations to the record to identify precisely when and to whom he made these complaints. It is fundamental that "[a]ny reference in an appellate brief to matter in the record must be supported by a citation to the volume and page number of the record where that matter may be found. [Citation.] This rule applies to matter referenced at any point in the brief, not just in

the statement of facts. [Citation.]" (*Sky River LLC v. County of Kern* (2013) 214 Cal.App.4th 720, 741; accord, *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 970; see also Cal. Rules of Court, rule 8.204(a)(1)(C).) Absent citations to the record, Kaufman's claim that he made a prima facie showing of wrongful termination in violation of public policy is supported by nothing more than his own unsupported assertions as to what the record shows.

Nevertheless, our review of Kaufman's citations to the record in his statement of facts reveals the following evidence: Matthias awarded the Veritas Project contract to MBI without requiring MBI to participate in the competitive bidding process mandated by Blue Shield's policy. Additionally, the contract was for time and materials, rather than a fixed fee. MBI failed to meet its deadlines and repeatedly asked for more money.

Kaufman began having suspicions about Mathias's relationship with MBI about the middle of 2014, when he "saw the constant missing of dates and bad deliverables." When he complained to Mathias that they were overpaying for something they were not getting, Mathias told Kaufman not to discuss it; it was Mathias's problem, not Kaufman's.

Mathias invited Kaufman to play golf with him and Nash, in order to improve Blue Shield's relationship with MBI. During the outing Kaufman brought up the problems he was having with MBI and asked if there was any way he could get a fixed price. Mathias and Nash refused to discuss business. Kaufman noticed that both Mathias and Nash had the same golf equipment, which seemed suspicious to Kaufman.

About October 2014, Thomas and Kaufman met with Mathias and raised the issue of MBI's defect rate. When Thomas

suggested they look at other vendors, Mathias got angry and asked them "not to talk about letting MBI go. That was his decision. This was his project."

Similarly, when Kaufman questioned Mathias about the choice of MBI, Mathias told him to shut up and leave the matter alone. Kaufman asked Mathias what else was going on, and whether there was "something funny I should know about?" Mathias responded by removing Kaufman from the Veritas Project, telling Kaufman: "[Y]ou're done with this. Don't talk about it anymore. I'm taking over."

Thomas and Kaufman began discussing the possibility Mathias was "on the take" and receiving some form of kickbacks from MBI.[5] About November or December 2014, Thomas and Kaufman decided to escalate their reporting of MBI. If they could not get Mathias to see that changing vendors was "the right thing to do," they would take the matter to Markovich.

In December 2014, Kaufman decided to go over Mathias's head and secure a fixed-fee bid on the project. When Mathias

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[5] Kaufman's discussion with Thomas about the possibility that Mathias was taking bribes or kickbacks did not constitute reporting for purposes of a wrongful termination cause of action. The report must be made to a supervisory employee with authority to make decisions over hiring and firing. (See *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 901, fn. 8; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70; cf. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 [for purposes of imposing liability on employer for constructive discharge, "the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees"].)

learned about it, he told Kaufman to stop. Kaufman instead obtained lower cost estimates from other vendors.

In January 2015, Kaufman reported to Senior Vice Presidents Thygeson and Davila that he "had RFPs that were substantially lower than what MBI was charging." Both indicated they were in favor of saving money, but they did not ask any further questions. Kaufman also told Mathias about the RFPs, and Mathias told Kaufman he had the matter under control.

Kaufman then decided to report the matter to Markovich and scheduled a meeting for Friday, March 6, 2015. Kaufman prepared for the meeting by putting together the RFPs, documenting "what we spent to date, what we were going to spend in the future, and also what we could spend and get it done for less. And looking for his approval to move forward with it."

On March 3, 2015, Kaufman emailed Mathias: "I know you are on vacation. I urgently need to speak with you. I understand how frustrating this is for you but really need to talk." Kaufman wanted to talk to Mathias about the cancellation of his corporate credit card and "[r]emoving the cancer from the organization, which was MBI. And [Kaufman] was going to start to show [Mathias] how much the RFPs were coming in at and how much [they] could save." Mathias did not get back to Kaufman.

The March 6, 2015 meeting with Markovich was cancelled without explanation and rescheduled to the following Thursday, March 12, 2015. However, on Monday, March 9, 2015, Kaufman was called into a meeting with O'Hara, Murray, and Mathias. O'Hara and Murray questioned Kaufman about his expenses. At the end of the meeting, O'Hara suspended Kaufman. The following day, O'Hara terminated him.

The same day that O'Hara terminated Kaufman, Mathias terminated Thomas and Masand for violating the Code of Conduct by interfering with an investigation by neglecting to tell the complete truth, failing to report a Code of Conduct violation, and "[f]ailure to raise concerns about the integrity and transparency of a Senior Executive." (Italics omitted.) Kaufman sought to use the timing of their termination as evidence of retaliation. As we discuss *post*, the trial court granted Blue Shield's motion in limine No. 13 to exclude this evidence.

e. *The Trial Court's Ruling on Blue Shield's Nonsuit Motion*

The trial court, in ruling on the nonsuit motion, asked Kaufman's counsel: "What is the evidence that he was going to talk to Mr. Markovich about anything other than this MBI program is, hey, this costs more money than it's worth. I'm prepared to show you this great presentation how another vendor can be doing this for cheaper. Let's assume that's the state of the evidence."

Kaufman's counsel argued the inference from Mathias's refusal to replace MBI was that there was fraud, bribery, or kickbacks involved. Blue Shield's counsel responded that a nonsuit "is an evidentiary motion. That is not the evidence. All that has been argument from counsel."

The court observed that "the problem here [is] that all we really have is Mr. Kaufman who thinks that this MBI program is . . . costing way too much money. . . . And at most we have is . . . Mr. Mathias with golf clubs that are just like one of the vendor['s]. . . . Where is the fundamental public policy involved here of an executive receiving some bling from a vendor?" The

trial court did not believe a possible violation of Blue Shield's policy equated to a violation of fundamental public policy. The court added: "[A]ll I've heard is a disagreement between [Mathias and] Mr. Kaufman, who thinks that he can get a better deal," and Mathias's failure to take it means he "must be on the take." The court was "just not seeing where there is the requisite disclosure or attempted disclosure of information that discloses a violation of state or federal statute[s] or . . . something that involves an issue of fundamental public policy. I just don't see it."

f. *Kaufman's Evidence Was Insufficient To Show that He Complained of Illegal Conduct or Violations of Fundamental Public Policy by Mathias*

It is clear from the evidence that Kaufman raised concerns about MBI's cost and performance multiple times with Mathias as well as other Blue Shield executives. He attempted to get approval to stop using MBI and hire another vendor to do the job for less money. While Kaufman had suspicions that Mathias may have accepted bribes or kickbacks, and he discussed that possibility with Thomas, he never raised the issue with Mathias or any of the other senior executives. The closest he came to doing so was when he questioned Mathias about why he was keeping MBI as a vendor and whether there was anything else he should know about; Kaufman did not suggest that Mathias was guilty of fraud or illegal conduct, however. Kaufman's vague questions were insufficient to place Mathias on notice that Kaufman was accusing him of fraud, embezzlement, bribery, or accepting kickbacks. (*Castro-Ramirez v. Dependable Highway*

Express, Inc., *supra*, 2 Cal.App.5th at p. 1046; *Luchetti v. Hershey Co.*, *supra*, 2009 WL 2912524 *5.)

Simply put, Kaufman did not "report[ ] suspicions of illegal conduct" by Mathias to Mathias or any of Mathias's superiors. (*Collier v. Superior Court*, *supra*, 228 Cal.App.3d at p. 1127; accord, *Haney v. Aramark Uniform Services, Inc.*, *supra*, 121 Cal.App.4th at pp. 642-643.) Kaufman reported to Thygeson and Davila that he "had RFPs that were substantially lower than what MBI was charging." This report does not convey a concern that Mathias was engaging in conduct that was illegal or a violation of fundamental public policy. It simply conveys a concern about the cost to Blue Shield of retaining MBI as a vendor. While this report may have served Blue Shield's private interests, it did not vindicate a substantial and fundamental public policy. (*Ferrick v. Santa Clara University*, *supra*, 231 Cal.App.4th at p. 1353; see, e.g., *Turner v. Anheuser-Busch, Inc.*, *supra*, 7 Cal.4th at p. 1257 ["[t]he tort of wrongful discharge is not a vehicle for enforcement of an employer's internal policies"].)

Moreover, there was no evidence that Kaufman communicated to Markovich that the purpose of the March 6, 2015 meeting was to report conduct by Mathias that was illegal or a violation of fundamental public policy. Additionally, there was no evidence that Kaufman raised the issue with O'Hara. She testified that Kaufman sent her "a very detailed email in advance of that March the 9th meeting wherein he admitted to a number of the things . . . about the use of the corporate credit card, as an example. He disclosed his personal relationship with Tara Reid. He disclosed the pictures of the bowling alley. So as you can imagine, he was pretty 'disclosive' and did not raise in that email

at all any reference whatsoever to needing to speak to me about any other issues."

In sum, Kaufman complained that Mathias's award of a time-and-materials contract instead of a fixed-fee contract to MBI, without competitive bidding, violated Blue Shield's policies. Kaufman complained that MBI was costing too much and delivering too little, and he could find a vendor who could deliver a better product at a lower cost. Violation of company policy regarding competitive bidding and retaining a nonperforming vendor do not constitute a violation of a fundamental public policy. (See *Ferrick v. Santa Clara University*, *supra*, 231 Cal.App.4th at p. 1353; *Haney v. Aramark Uniform Services, Inc.*, *supra*, 121 Cal.App.4th at p. 642.) Neither was it illegal conduct, which would constitute protected activity for purposes of a wrongful termination cause of action. (*Haney*, *supra*, at pp. 642-643; *Collier v. Superior Court*, *supra*, 228 Cal.App.3d at p. 1127.) Absent a complaint to Mathias or a supervisor about a claimed violation of public policy or illegal conduct, Kaufman could not make a prima facie showing of wrongful termination in violation of public policy. (*Castro-Ramirez v. Dependable Highway Express, Inc.*, *supra*, 2 Cal.App.5th at p. 1046; *Haney*, *supra*, at p. 641.)

3. *Wrongful Termination in Violation of Labor Code Section 1102.5*

Labor Code section 1102.5, subdivision (b) (section 1102.5(b)), provides: "An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, . . . to a person

with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties."

Similar to a cause of action for wrongful termination in violation of public policy, a prima facie case of retaliation in violation of section 1102.5(b) requires an employee to show that he engaged in protected activity, he was subjected to an adverse employment action, and there was a causal link between the two. (*McVeigh v. Recology San Francisco*, *supra*, 213 Cal.App.4th at p. 468.)

As the trial court observed, what Kaufman disclosed to Mathias was not a violation of the law; it was at most a violation of Blue Shield's internal policies. Section 1102.5(b) "requires that to come within its provisions, the activity disclosed by an employee must violate a federal or state law, rule or regulation. [Citation.]" (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 821-822.) "[T]his case is not about perceived violations of federal or state statutes, rules or regulations but rather about perceived violations of" Blue Shield's policies, to which the statute does not apply. (*Id.* at p. 822.) Kaufman's unexpressed suspicion that Mathias was taking bribes or kickbacks was insufficient to establish that Blue Shield terminated him " 'for *reporting* his "reasonably based suspicions" of illegal activity. [Citation.]' [Citation.]" (*Ferrick v. Santa Clara University*, *supra*, 231 Cal.App.4th at p. 1345, italics added; see *Castro-Ramirez v. Dependable Highway Express, Inc.*,

supra, 2 Cal.App.5th at p. 1046; *Reid v. Concentra Health Services, Inc.*, *supra*, 2015 WL 1729873 *12.)

Simply put, Kaufman failed to introduce evidence sufficient to establish a prima facie case of wrongful termination in violation of public policy or whistleblower retaliation in violation of section 1102.5(b). The trial court did not err in granting a nonsuit as to that cause of action. (*California Farm Bureau Federation v. State Water Resources Control Bd.*, *supra*, 51 Cal.4th at p. 436; *Orange County Water Dist. v. MAG Aerospace Industries, Inc.*, *supra*, 12 Cal.App.5th at p. 239.)[6]

B. *Kaufman's Cause of Action for Failure To Pay Earned Executive Incentive Compensation*

Kaufman contends that when the trial court granted Blue Shield's nonsuit motion, "it had the unintended consequences of effectively eviscerating Kaufman's [failure to pay earned executive incentive compensation] cause of action, because as a matter of law Kaufman could no longer argue that he was not terminated for 'cause,' but terminated wrongfully [in] retaliation for exposing Mathias'[s] unlawful vendor misconduct." He makes no other argument attacking the jury's verdict on his executive compensation cause of action.

Kaufman claims that reversal of the nonsuit "resurrects" his cause of action. In light of our conclusion that the trial court did not err in granting the nonsuit, Kaufman has failed to meet

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[6] Kaufman raises no claims as to the nonsuit on his causes of action for conversion and theft of labor and for breach of contract, so any such claim is forfeited. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 355.)

his burden of demonstrating error with respect to the judgment in favor of Blue Shield on the executive incentive compensation cause of action. (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1224.)

C. *Whether the Trial Court Erred in its Evidentiary Rulings*

1. *Motion To Compel Production of Documents*

Prior to trial, Kaufman, Thomas, and Masand filed a motion to compel production of documents at trial pursuant to Code of Civil Procedure section 1987, subdivision (c) (section 1987). Request No. 20 was for Blue Shield's "Concur Expense Management System audit logs (weekly, monthly, quarterly, annual) of Aaron Kaufman from March 2013 through March 2015."

Blue Shield objected to the motion on a number of grounds. In part, it objected that the request was overbroad, unduly burdensome, and oppressive. It also objected that Kaufman, Thomas, and Masand were "improperly attempting to utilize the [motion] as a calculated effort to circumvent the discovery cut-off. Certain of the information called for by the requests was known to, but not sought by, [the p]laintiffs from Blue Shield during the course of discovery."

As to request No. 20, Blue Shield argued that Kaufman, Thomas, and Masand served Blue Shield with requests for production of hundreds of documents. "Yet, none of those discovery requests asked Blue Shield to produce the Concur audit logs sought by this request. Instead, . . . Kaufman sought this information during discovery from third-party Concur Technologies, Inc. ('Concur'), which objected to [the p]laintiffs[']

requests, *inter alia*, on the grounds that such requests were vague, irrelevant, unduly burdensome and estimated to cost Concur 'more than $5 million for programmer-and server-time' to review and respond to the requests. [The p]aintiffs thereafter failed to file a motion to compel or otherwise pursue the information requested from Concur during discovery. It would be extraordinarily time-consuming, unduly burdensome, and unreasonable to now require Blue Shield to search for, review and prepare for production 'weekly, monthly, quarterly, [and] annual' audit logs for a two-year time period, as called for by this request, which [the p]laintiffs never sought from Blue Shield and never moved to compel from Concur. For each of these reasons, therefore, this request is unduly burdensome, harassing, and unreasonable."

The trial court sustained Blue Shield's objection. It explained that "the [section] 1987 demand is not a substitute for discovery. If you ask for these things in discovery, okay. There's the opportunity to have a meaningful meet and confer. If there's an objection, to decide what should or should not be produced in a blanket request like this would previously ha[ve] been objected to . . . and we have the additional objection of vague, and then I don't know quite what you're asking for." The court did not believe this was "a legitimate request as phrased in [section] 1987." If Kaufman had asked for a specific document in Blue Shield's possession the court would have ordered it to be produced, even if it had not been the subject of a discovery request. However, "[s]omething like these audit reports, not previously produced in discovery, . . . I'm going to sustain the objection."

Kaufman's counsel pointed out that he had requested the documents from Blue Shield during discovery, "and they turned the ball around to us and said, 'Concur has the documents. Go get it from them.' So we went and did our discovery through Concur. And Concur says, 'That's a Blue Shield-specific document. They have it.' They're hiding evidence, your honor." The court responded that Kaufman should have gone back and made the discovery request to Blue Shield. "Again, [section] 1987 is not a substitute for discovery. . . . So the objection is sustained."

Section 1987 governs service of a subpoena to produce a party or a document. Subdivision (c) provides that if a written notice requiring a witness to attend court proceedings "is served at least 20 days before the time required for attendance, or within any shorter period of time as the court may order, it may include a request that the party or person bring with him or her books, documents, electronically stored information, or other things. The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. Within five days thereafter, or any other time period as the court may allow, the party or person of whom the request is made may serve written objections to the request or any part thereof, with a statement of grounds. Thereafter, upon noticed motion of the requesting party, accompanied by a showing of good cause and of materiality of the items to the issues, the court may order production of items to which objection was made, unless the objecting party or person establishes good cause for nonproduction or production under limitations or conditions. . . ."

As a general rule, we review the trial court's ruling on discovery issues under the deferential abuse of discretion standard. (*Manela v. Superior Court* (2009) 177 Cal.App.4th 1139, 1145; *Krinsky v. Doe 6* (2008) 159 Cal.App.4th 1154, 1161.) " ' "Management of discovery generally lies within the sound discretion of the trial court." [Citation.] "Where there is a basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court. [Citation.] The trial court's determination will be set aside only when it has been demonstrated that there was 'no legal justification' for the order granting or denying the discovery in question." ' [Citation.]" (*Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 740; accord, *National Football League Properties, Inc. v. Superior Court* (1998) 65 Cal.App.4th 100, 106-107.)

We perceive no abuse of discretion here. ~[Deletion]~ Rather than go through the process of winnowing down a broad and potentially burdensome request for documents to one that provided Kaufman with the relevant documents he needed for his case through discovery, Kaufman attempted to use section 1987 "as a substitute for formal discovery" (*Doe 1 v. Superior Court* (2005) 132 Cal.App.4th 1160, 1172; see, e.g., *International Harvester Co. v. Superior Court* (1969) 273 Cal.App.2d 652, 655 [request for admissions "cannot be employed as a substitute for discovery procedures to uncover evidence"]). The trial court's refusal to allow Kaufman to do so, with the resultant burden falling on Blue Shield, was not an abuse of discretion. (See *Calcor Space Facility, Inc. v. Superior Court*, *supra*, 53 Cal.App.4th at p. 224.)

2. *Kaufman's Motion in Limine No. 13: Motion To Exclude Reference to Kaufman's Violation of Travel & Expense Policy Based on Failure To Produce Expense Audit Logs*

We review the trial court's evidentiary rulings under the abuse of discretion standard. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078; *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1273.) The trial court abuses its discretion "if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason." (*Coyne v. De Leo* (2018) 26 Cal.App.5th 801, 814; accord, *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

Kaufman based his motion on Blue Shield's failure to produce the expense audit logs during discovery. As discussed above, the trial court did not abuse its discretion in denying Kaufman's motion to produce the audit logs, because Kaufman failed to use proper discovery procedures to obtain them. Kaufman made no other argument to support exclusion of the audit logs. Accordingly, the trial court did not abuse its discretion in also denying his motion in limine No. 13.

3. *Blue Shield's Motion in Limine No. 13: Motion To Exclude Evidence of Thomas's and Masand's Termination*

Blue Shield's motion in limine No. 13 sought to exclude all evidence as to the termination of any settling plaintiffs or the settlement of their claims against Blue Shield. Blue Shield argued such evidence was irrelevant (Evid. Code, §§ 210, 350), and any probative value was outweighed by the danger of unfair

prejudice, unnecessary delay, confusing the issues, and misleading the jury (*id.*, § 352). ~[Deletion]~

In argument on the motion, Blue Shield's counsel indicated Blue Shield had settled with Thomas and Masand to avoid any examination of the two regarding their claims against Blue Shield. The trial court thought the only reason to bring the matter up would be to show potential bias but asked why Kaufman's counsel wanted to introduce the evidence. Counsel responded: "The fact that they were terminated and the fact that they filed a claim, I think that just by itself should be—the jury should be able to hear that." Blue Shield's counsel indicated there were terms in the settlement agreements to address that point. The trial court stated that "the only reason I would think it would be relevant is that I postulated if defendants wanted to impeach them for some potential bias or prejudice." The court then tentatively granted the motion.

Kaufman claims the evidence of Thomas's and Masand's termination was relevant to prove whistleblower retaliation against Kaufman. The trial court "has broad discretion under Evidence Code section 352 to exclude even relevant evidence if [the court] determines the probative value of the evidence is substantially outweighed by its possible prejudicial effects. [Citation.] An appellate court reviews a court's rulings regarding relevancy and admissibility under Evidence Code section 352 for abuse of discretion. [Citation.] We will not reverse a court's ruling on such matters unless it is shown ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citation.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 74.) We will find a miscarriage of justice only where it

is reasonably probable that the appealing party would have obtained a more favorable result absent the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

No miscarriage of justice resulted from the exclusion of evidence that Thomas and Masand were also terminated. This evidence would not have supplied the missing elements of Kaufman's prima facie showing of retaliation, i.e., that Kaufman complained to Mathias or a supervisor that Mathias was engaging in conduct that was illegal or violated fundamental public policy. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 800.)

4. *Blue Shield's Motion in Limine No. 7: Motion To Exclude Evidence of Benefits Mathias Allegedly Received from Vendors Other Than MBI*

Blue Shield moved "to exclude any evidence, references to evidence, testimony or argument relating to any alleged benefits that Michael Mathias took or received from IT vendors other than MBI" on the grounds of relevancy and prejudice (Evid. Code, §§ 210, 350, 352) and that it was based on inadmissible hearsay (*id.*, § 1200). Kaufman responded that Mathias's acceptance of a trip to London for himself and his wife from another vendor was further evidence of Mathias's violation of Blue Shield's Code of Conduct. The trial court tentatively granted this motion on the ground the evidence was irrelevant, in that Kaufman never made any reports as to Mathias's receipt of benefits from the other vendor.

On appeal, Kaufman fails to demonstrate the relevance of the proffered evidence. Even if the evidence had some relevance,

its exclusion could not have been prejudicial because the evidence would not have supplied the fatal omission in Kaufman's proof—the absence of Kaufman's complaints to Mathias or a supervisor that Mathias was engaging in conduct that violated the law or fundamental public policy. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 800.)

5. *Blue Shield's Motion in Limine No. 4: Motion To Exclude Evidence that in 2014 the Franchise Tax Board Revoked Blue Shield's Tax Exempt Status*

Blue Shield moved to exclude evidence of the Franchise Tax Board's 2014 decision to revoke Blue Shield's tax exempt status on the grounds of relevancy, prejudice, and hearsay (Evid. Code, §§ 210, 350, 352, 1200). The motion was based on Kaufman, Thomas, and Masand's reference in their complaints to the revocation, as well as their request for judicial notice of a Los Angeles Times article and of the pleadings in an unrelated case. Judicial notice was requested to show "that Blue Shield needed to 'quickly silence plaintiffs' after 'the Franchise Tax Board's revocation of [Blue Shield's] "non-profit" tax exempt status *based upon assorted waste and financial abuses* went public.' " In response, Kaufman argued that Blue Shield's appeal to regain its tax exempt status was the "motivating reason to terminate Kaufman," in order to protect Blue Shield from further exposure of its financial abuses.

The trial court pointed out that Kaufman was terminated seven months after Blue Shield's tax exempt status was revoked, so the court was a "little unclear as to the correlation between the two." Additionally, "you try to silence someone, the worst thing

[to do] is to terminate them. If they're still your employee, you got some control over them. So I didn't quite follow the argument. So I'm not quite sure what the relationship of Blue Shield's Franchise Tax Board status has to the issues in this case. So that, again, is a[] tentative grant."

On appeal, Kaufman reiterates, "[a] reasonable inference can be drawn that Mathias'[s] motivation to silence [Kaufman, Thomas, and Masand] related in whole, or in part, to the [Franchise Tax Board's] revocation and [Blue Shield's] pending appeal." As the trial court observed, Kaufman alleged that he was terminated to prevent him from reporting his concerns about Mathias and MBI to Marcovich. He did not allege that his termination had anything to do with Blue Shield's already-revoked tax exempt status. The trial court was well within its discretion under Evidence Code section 352 to exclude the evidence to avoid confusing the jury and prevent an undue consumption of time. (See *McGee v. Cessna Aircraft Co.* (1983) 139 Cal.App.3d 179, 185.)

Moreover, as with Blue Shield's motion in limine No. 13, no miscarriage of justice resulted from the exclusion of the evidence. Evidence of the Franchise Tax Board's 2014 decision to revoke Blue Shield's tax exempt status would not have supplied the missing elements of Kaufman's prima facie showing of retaliation—that Kaufman complained to Mathias or a supervisor that Mathias was engaging in conduct that was illegal or violated fundamental public policy. (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 800.)

II. On Cross-Appeal

In its cross-appeal, Blue Shield contends that it is entitled to a new trial, in that the jury verdicts were inconsistent and not supported by substantial evidence. We agree the verdicts are not supported by substantial evidence and reverse on that basis.

In its special verdicts, the jury found with respect to Blue Shield's fraud by intentional misrepresentation claim: Kaufman "represent[ed] to Blue Shield that his personal expenses charged to the Blue Shield corporate credit card were legitimate business expenses"; he knew these representations were false; he "intend[ed] for Blue Shield to pay for any personal charge to the corporate credit card (based on his representation(s) that they were legitimate business expenses)"; and Blue Shield reasonably relied on Kaufman's false representations. The jury also found Blue Shield was not harmed by Kaufman's false representations.

On Blue Shield's claim for breach of fiduciary duty, the jury found Kaufman was an executive at Blue Shield, and he failed to act as a reasonably careful executive would have acted under similar circumstances. The jury further found Blue Shield was not harmed by this failure.

When a party challenges the sufficiency of the evidence to support a jury verdict, "we apply the substantial evidence standard of review. [Citations.] In applying this standard, we 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .' [Citation.]" (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1096.)

Here, there was no evidence that Blue Shield was not harmed in some amount by Kaufman's fraud and breach of fiduciary duty. As Blue Shield's expert testified, Kaufman

charged personal expenses on his corporate credit card and did not repay Blue Shield in full for those charges. Kaufman himself admitted this to be the case. He acknowledged that, at the time of trial, he still owed Blue Shield between $7,000 and $12,000.

Inasmuch as the undisputed evidence, including Kaufman's admissions, showed Blue Shield was harmed by his fraud and breach of fiduciary duty, the jury's finding of no harm, and thus the judgment in favor of Kaufman on the cross-complaint, are not supported by substantial evidence. (See *Heap v. General Motors Corp.* (1977) 66 Cal.App.3d 824, 831-832 [findings not supported by the evidence where the only evidence in the record was to the contrary].) Reversal of the judgment is thus required.

DISPOSITION

The judgment is reversed as to Blue Shield's causes of action for fraud by intentional misrepresentation and breach of fiduciary duty in its cross-complaint. Blue Shield is entitled to a new trial as to these causes of action. In all other respects, the judgment is affirmed. Blue Shield is to recover its costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J. BENDIX, J.